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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 121

PAUL H. BARNES,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA EX REL. EMMA K. BARNES.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SAMUEL KAGLE,
Counsel for Respondent.

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PAUL H. BARNES,
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COMMONWEALTH OF PENNSYLVANIA EX REL. EMMA K. BARNES.

RESPONDENT'S BRIEF.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Emma K. Barnes, above-named Relatrix by her Counsel, Samuel Kagle, Esquire, respectfully urges that the Petition of Paul H. Barnes for a Writ of Certiorari be dismissed and in support of this prayer it is respectfully submitted:

1. The facts in the case fail to present a substantial Federal question.

2. Although Petitioner avers that he raised the questions as to the denial of Due Process in the Courts below, the Assignment of Error and the Statement of Questions Involved in the record before the Superior Court of Pennsylvania fail to disclose that such questions were raised. The Assignment of Error filed in the Superior Court, which under the existing law is the exclusive appellate forum for Domestic Relations Cases, appears on page ninety-three (93) of the Transcript of Record. In the interest of brevity the Assignment will not set out verbatim but it was directed

merely to the dismissal of the Petition to Vacate or to Reduce the existing support order.

The Petitioner's brief in support of his appeal raised eight questions but none raised the question of the denial of Due Process. The Statement of Questions involved in the brief is not part of the record which is before this Court, and it is appended hereto as Exhibit "A".

3. The cause which the Petitioner has vigorously prosecuted through the several Courts of the Commonwealth of Pennsylvania is lacking in merit and is only brought to harass a needy wife whose right to support has been continuously upheld by said Courts since 1929.

I. The Contention As to a Denial of Due Process Is Without Merit.

Petitioner contends that the action of the Courts below violated the Due Process Clause of the Federal Constitution. The basis for this remarkable contention is that because the Pennsylvania Courts refused to allow credit for the amounts paid for counsel fees in these proceedings as deductible expenses in arriving at the net income in fixing the amount of support he was in effect denied the right to be heard by Counsel. *Petitioner—a man of substantial means—was represented by Counsel at every stage of the proceedings which have been heard by the Courts on at least sixteen (16) different occasions, and in the present proceeding he has been represented by two Attorneys in the Trial Court and on appeal.*

In *Grozza* v. *Tierman,* 138 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599, the Supreme Court said:

> "Due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of powers of government."

In the instant case these requirements have been fully met in every respect.

II. The Federal Question Was Not Properly Raised in the Court Below.

Assuming that a substantial Federal question did exist, we respectfully urge that this Honorable Court should deny the Certiorari because the question was not properly raised in the Courts below.

Under the Law of the Commonwealth of Pennsylvania the Superior Court is the exclusive appellate forum in Domestic Relations cases, and as we have pointed out hereinabove the Petitioner failed to raise said constitutional questions in his Assignments of Error or the Statement of the Questions Involved.

In *Herndon* v. *State of Georgia*, 295 U. S. 441, 55 Sup. Ct. Rep. 794, this Court held that it was without jurisdiction to review a case because no Federal question was seasonably raised in the Court below or passed upon by that Court. The Court said (R. 443):

> "The Federal question was never properly presented to the State Supreme Court unless upon motion for rehearing; and that Court then refused to consider it. The long established general rule is that the attempt to raise a Federal question after judgment, upon a petition for rehearing comes too late unless the Court actually entertains the question and decides it".

In the instant case the same situation exists. The first time the Federal question was raised by Petitioner was after final judgment of the Superior Court and on Petition for Reargument. In this case the Court never decided the question.

In conclusion we respectfully urge that the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

SAMUEL KAGLE,
Counsel for Respondent.

EXHIBIT "A".

I.

Statement of Questions Involved.

1. Whether divorce action of Appellant *v.* Appellee, previously disposed of, had any bearing on question at issue?

2. Whether the Court should not have taken into consideration Appellee's separate income in deciding the Appellant's petition for Vacation or Substantial Reduction of the Order?

3. Whether the Court was justified in refusing to allow Appellant's deductions of "non-recurring" or "infrequent" income?

4. Whether the Court was justified in refusing to allow Appellant's deductions of office rent and cost of and maintenance of automobile?

5. Whether the Court was justified in refusing to allow as deductions from Appellant's income his Counsel fees and legal costs?

6. Whether the Court erred in considering Capital Return, re-invested, as Income?

7. Whether the Court erred in not considering Appellant's liability for taxes as affecting his income status?

8. Whether the Court erred in refusing to sustain Appellant's petition for Vacation or Substantial Reduction of the Order of $15.00 per week?